

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34221

STATE OF IDAHO,)	2008 Unpublished Opinion No. 616
)	
Plaintiff-Respondent,)	Filed: August 26, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
KELLY RAY ROBINETT,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Judgment of conviction and unified sentence of twelve years, with a minimum period of confinement of seven years, for possession of a controlled substance and being a persistent violator, affirmed in part, vacated in part, and remanded.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jennifer E. Birken, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Kelly Ray Robinett appeals from his judgment of conviction and unified sentence of twelve years, with a minimum period of confinement of seven years, for possession of a controlled substance and being a persistent violator. For the reasons set forth below, we affirm his judgment of conviction, but vacate his sentence and remand.

A jury found Robinett guilty of possession of a controlled substance, I.C. § 37-2732(c), and being a persistent violator, I.C. § 19-2514. The district court sentenced Robinett to a unified term of seven years, with a minimum period of confinement of three years, for possession of a controlled substance.¹ The district court then enhanced Robinett's sentence to a unified term of eleven years, with a minimum period of confinement of seven years, based on the persistent

¹ The jury also found Robinett guilty of possession of drug paraphernalia, but he does not challenge this judgment of conviction on appeal.

violator finding. After a recess, the district court further increased Robinett's sentence to a unified term of twelve years, with a minimum period of confinement of seven years, reasoning that I.C. § 19-2514 required it to impose a minimum five-year enhancement in addition to the sentence for the underlying offense. Robinett appeals.

Robinett alleges that the district court abused its discretion when it held that it was constrained by the persistent violator statute to impose a minimum five-year enhancement in addition to the sentence imposed for the underlying offense. Additionally, Robinett argues that his sentence is excessive and that the district court abused its discretion in imposing any enhancement beyond the unified term of seven years because the statute does not require that the district court impose any sentence beyond that of the underlying offense, so long as it imposes the mandatory minimum term of five years. Therefore, Robinett argues that this Court should reduce his sentence on appeal. The state concedes that the district court abused its discretion, but asserts that the case should be remanded for resentencing by the district court.

When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

At the sentencing hearing, the district court recognized its discretion in sentencing and stated:

[A]n extended period of time away from drugs is necessary if you are going to have any hope at all of recovering from the drug problem.

And based upon that, this court will impose a sentence with regard to Count I for three years fixed and four years indeterminate

. . . .

And with regard to sentence enhancement, the court will enhance the sentence with regard to the persistent violator conviction for an added period of four years, for a total sentence of seven years fixed and four years indeterminate.

After a recess, the court stated:

I've been advised by the State that this particular statute requires a minimum sentence of five years in terms of the enhancement. However, . . . even though it requires imposition of a minimum five-year sentence, it does not require that all

five years be fixed. So the court is going to impose the four-year sentence I told you about before with regard to the enhancement and one additional year indeterminate. So that will make your total sentence a period of seven years fixed and five years indeterminate

. . . .

Well, I'll point out that the court had forgotten, quite frankly, about the five-year minimum sentence in the case. And even though it does not say a minimum mandatory sentence of five years, I must impose a five-year sentence. I don't think I can impose an enhancement and then make one year concurrent with the enhancement.

As I indicated, the reason that I was giving the three-year plus four-year sentence for the underlying charge, which is what I would impose in any event, and then I gave the minimum amount that I could on the enhancement, pointing out the mitigating factors in particular of family support in this case.

I can't give a minimum sentence of less than the minimum sentence prescribed by the legislature in terms of the five years. And the court will give the four years fixed and one year indeterminate to meet the five-year sentencing requirement.

. . . .

. . . I've given him the minimum sentence that I can give under the enhancement statute.

First, we must consider whether the district court abused its discretion in imposing an additional unified term of five years, with a minimum period of confinement of four years, as a result of Robinett's status as a persistent violator. Idaho Code Section 19-2514 requires that a three-time felon receive a minimum sentence of five years, and that the district court has discretion to impose up to life. The statute does not create a new crime but, instead, provides for the imposition of a greater punishment for the underlying conviction. *Lopez v. State*, 108 Idaho 394, 395, 700 P.2d 16, 17 (1985); *State v. Salazar*, 95 Idaho 650, 651, 516 P.2d 707, 708 (1973); *State v. Greensweig*, 102 Idaho 794, 800, 641 P.2d 340, 346 (Ct. App. 1982).

In this case, the district court failed to perceive the issue of persistent violator sentence enhancement as one of discretion. It indicated that it was bound by the statute to impose at least a five-year term *in addition to* that imposed for the underlying offense. However, the statute requires only that a persistent violator receive a sentence for a term up to life, but not less than five years, for the third felony conviction. It does not require imposition of five years in addition to an underlying sentence for the felony. Because the district court failed to recognize the correct bounds of its discretion, its imposition of an additional unified term of five years as a

persistent violator enhancement, above the unified term of seven years imposed for possession of a controlled substance, constituted an abuse of discretion. Therefore, Robinett's judgment of conviction is affirmed, but his sentence must be vacated and his case remanded for resentencing before the district court. Based upon our disposition on this issue, we need not address Robinett's additional argument that his sentence is excessive.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**